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**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA; STATES OF  
 CALIFORNIA, COLORADO, CONNECTICUT,  
 DELAWARE, FLORIDA, GEORGIA, HAWAII,  
 ILLINOIS, INDIANA, IOWA, LOUISIANA,  
 MICHIGAN, MINNESOTA, MONTANA,  
 NEVADA, NEW JERSEY, NEW MEXICO,  
 NEW YORK, NORTH CAROLINA,  
 OKLAHOMA, RHODE ISLAND,  
 TENNESSEE, TEXAS, VERMONT, AND  
 WASHINGTON; THE COMMONWEALTHS  
 OF MASSACHUSETTS AND VIRGINIA; AND  
 THE DISTRICT OF COLUMBIA,

*ex rel.* ZACHARY SILBERSHER,

Plaintiffs,

v.

ALLERGAN, INC., ALLERGAN USA, INC.,  
 ALLERGAN SALES, LLC, FOREST  
 LABORATORIES HOLDINGS, LTD.,  
 ADAMAS PHARMA, AND ADAMAS  
 PHARMACEUTICALS, INC.,

Defendants.

Case No.: 3:18-cv-03018-JCS

**PLAINTIFF-RELATOR ZACHARY  
 SILBERSHER'S OPPOSITION TO  
 DEFENDANTS' MOTION TO  
 CERTIFY ORDER FOR IMMEDIATE  
 APPEAL AND FOR STAY (DKT. 136)**

Chief Magistrate Judge Joseph C. Spero

Hearing Date: February 5, 2021  
 Time: 9:30 a.m.

Courtroom G, 15th Floor  
 Phillip Burton Federal Building  
 450 Golden Gate Avenue  
 San Francisco, CA 94102

Action Filed: May 22, 2018

**TABLE OF CONTENTS**

I.	INTRODUCTION .....	1
II.	BACKGROUND .....	3
III.	ARGUMENT .....	5
	A. The Court Should Decline to Certify the Order for Interlocutory Appeal.....	5
	1. Interlocutory Appeal Is Reserved for Rare Circumstances.....	5
	2. The Public Disclosure Issues are not Controlling Questions of Law .....	6
	3. Defendants Have Failed to Establish Substantial Ground for Difference of Opinion as to the Public Disclosure Bar .....	7
	4. Defendants Have Failed to Establish That Interlocutory Review of the Order Will Materially Advance the Ultimate Termination of this Litigation .....	10
	B. The Court Should Decline to Stay This Action Pending an Interlocutory Appeal .....	12
	C. The Court Should Decline to Stay This Action Pending the Resolution of the Ninth Circuit Appeals in the <i>Valeant</i> and <i>Integra</i> Cases .....	14
IV.	CONCLUSION.....	16

## TABLE OF AUTHORITIES

## CASES

<i>Allen v. ConAgra Foods, Inc.</i> , 2019 WL 1466889 (N.D. Cal. Feb. 6, 2019) .....	13
<i>Ambrosio v. Cogent Commc'ns, Inc.</i> , 2016 WL 777775 (N.D. Cal. Feb. 29, 2016) .....	13
<i>Andrews v. Plains All Am. Pipeline, L.P.</i> , 2017 WL 9831401 (C.D. Cal. Nov. 7, 2017).....	12
<i>Asis Internet Servs. v. Active Response Grp.</i> , 2008 WL 4279695 (N.D. Cal. Sept. 16, 2008) .....	17
<i>Beeman v. Anthem Prescription Mgmt., Inc.</i> , 2007 WL 8433884 (C.D. Cal. Aug. 2, 2007) .....	12
<i>Brizzee v. Fred Meyer Stores, Inc.</i> , 2008 WL 426510 (D. Or. Feb. 13, 2008) .....	7
<i>CMAX, Inc. v. Hall</i> , 300 F.2d 265 (9th Cir. 1962).....	18, 19
<i>Coopers &amp; Lybrand v. Livesay</i> , 437 U.S. 463 (1978).....	7
<i>Couch v. Telescope Inc.</i> , 611 F.3d 629 (9th Cir. 2010) .....	8, 9
<i>DeLuca v. Farmers Ins. Exch.</i> , 2019 WL 4260437 (N.D. Cal. Sept. 9, 2019) .....	9, 12
<i>Exec. Software North Am., Inc. v. U.S. Dist. Court for Cent. Dist. of Cal.</i> , 24 F.3d 1545 (9th Cir. 2008).....	7
<i>Flo &amp; Eddie, Inc. v. Sirius XM Radio, Inc.</i> , 2015 WL 4397175 (C.D. Cal. June 8, 2015).....	16
<i>Heaton v. Soc. Fin., Inc.</i> , 2016 WL 232433 (N.D. Cal. Jan. 20, 2016) .....	7
<i>In re Cement Antitrust Litig.</i> , 673 F.2d 1020 (9th Cir. 1981) .....	6
<i>In re Namenda IR Antitrust Litig.</i> , 1:15-cv-07488-CM (S.D.N.Y.).....	14, 17
<i>In re: Restasis Antitrust Litigation</i> , Case No. 1:18-md-02819 (E.D.N.Y.) .....	14
<i>James v. Price Stern Sloan, Inc.</i> , 283 F.3d 1064 (9th Cir. 2002) .....	1, 6, 7
<i>Landis v. N. Am. Co.</i> , 299 U.S. 248 (1936).....	18
<i>Leiva-Perez v. Holder</i> , 640 F.3d 962 (9th Cir. 2011) .....	15
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	15
<i>Phan v. Transamerica Premier Life Ins. Co.</i> , 2020 WL 5576358 (N.D. Cal. Sept. 17, 2020).....	18, 19
<i>Reese v. BP Expl. (Alaska) Inc.</i> , 643 F.3d 681 (9th Cir. 2011).....	8
<i>Schindler Elevator Corp. v. U.S. ex rel. Kirk</i> , 563 U.S. 401 (2011).....	4, 9
<i>Shurance v. Planning Control Int'l, Inc.</i> , 839 F.2d 1347 (9th Cir. 1988).....	13
<i>Spears v. Wash. Mut. Bk. FA</i> , 2010 WL 54755 (N.D. Cal. Jan. 8, 2010) .....	8, 12

1	<i>Stiner v. Brookdale Senior Living, Inc.</i> , 383 F. Supp. 3d 949 (N.D. Cal. 2019) .....	15, 16
2	<i>Tsyn v. Wells Fargo Advisors, LLC</i> , 2016 WL 1718139 (N.D. Cal. Apr. 29, 2016) .....	2, 8, 12
3	<i>Tumampos v. Cathay Pac. Airways Ltd.</i> , 2017 WL 10443170 (N.D. Cal. June 30, 2017) .....	10
4	<i>United States ex rel. Integra Med Analytics LLC v. Providence Health &amp; Servs.</i> , 2019 WL 3282619 (C.D. Cal. July 16, 2019) .....	3, 5, 10, 18
5	<i>United States ex rel. Integra Med. Analytics LLC v. Providence Health &amp; Servs.</i> , 2019 WL 6973547 (C.D. Cal. Oct. 8, 2019) .....	10
6	<i>United States ex rel. Mei Ling v. City of Los Angeles</i> , 2019 WL 6971061 (C.D. Cal. Oct. 2, 2019) .....	7, 12
7	<i>United States ex rel. Silbersher v. Valeant Pharms. Int'l, Inc.</i> , 445 F. Supp. 3d 393 (N.D. Cal. 2020) .....	2, 11, 18
8	<i>United States Rubber Co. v. Wright</i> , 359 F.2d 784 (9th Cir. 1966) .....	1, 6
9	<i>Virginian R. Co. v. United States</i> , 272 U.S. 658 (1926) .....	15
10	<i>Yong v. INS</i> , 208 F.3d 1116 (9th Cir. 2000) .....	17

#### STATUTES

13	28 U.S.C. § 1291 .....	6
14	28 U.S.C. § 1292 .....	<i>passim</i>

#### RULES

15	Fed. R. Civ. P. 1 .....	3, 13, 19
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1 **I. INTRODUCTION**

2 On December 11, 2020, the Court issued a 76-page Order (Dkt. 135) denying in their entirety  
 3 Defendants’ motions to dismiss this False Claims Act (FCA) case. At the conclusion of oral argument,  
 4 the Court, after noting that discovery was stayed pending a decision on the motions, remarked: “If I  
 5 deny the motion[s], then I’ll open discovery and we’ll set a schedule and get it all done.” (Dkt. 116 at  
 6 56:16-19.) Accordingly, in the same Order in which it denied Defendants’ motions, the Court set a  
 7 Case Management Conference for the following month and directed the parties to submit a proposed  
 8 schedule for proceeding with the case. (Dkt. 135 at 76.)

9 Conspicuously absent from the 76-page Order was any indication that the Court, in working  
 10 through the public disclosure issues, had any inclination to put this action on hold so that the Ninth  
 11 Circuit might decide whether to accept an interlocutory appeal—a step that is reserved for “rare  
 12 circumstances,” is committed to the district court’s unfettered, unreviewable discretion to grant or  
 13 deny, and which “quite frequently” is summarily denied by the Ninth Circuit even in those exceptional  
 14 cases in which the district court grants permission to seek it. *James v. Price Stern Sloan, Inc.*, 283 F.3d  
 15 1064, 1067 n.6 (9th Cir. 2002).

16 Defendants nevertheless ask the Court to take the extraordinary step of certifying its Order for  
 17 interlocutory appeal because Defendants’ motions presented “‘difficult’ questions . . . which required  
 18 the Court to ‘grapple’ with the impact of the 2010 amendments to the FCA.” (Mot. at 1 (*citing*  
 19 Dkt. 135 at 32-33).) But interlocutory review is “not intended merely to provide review of difficult  
 20 rulings in hard cases.” *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Instead,  
 21 Defendants bear the heavy burden of establishing that the Order presents a “controlling question of  
 22 law as to which there is substantial ground for difference of opinion and that an immediate appeal  
 23 from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b).

24 Defendants have failed to demonstrate that any ground for difference of opinion as to the  
 25 public disclosure bar issues here is “substantial.” Defendants point primarily to this Court’s  
 26 disagreement with *United States ex rel. Silbersher v. Valeant Pharms. Int’l, Inc.*, 445 F. Supp. 3d 393  
 27 (N.D. Cal. 2020) (“*Valeant*”)—specifically, with the *Valeant* court’s interpretation of the phrase

1 “Federal . . . hearing.” But as courts in this district have recognized, because an interlocutory appeal is  
 2 an “exceptional” case, “it would not warrant a § 1292(b) appeal simply because another district court  
 3 reached a different decision in a broadly similar case.” *Tsyn v. Wells Fargo Advisors, LLC*, 2016 WL  
 4 1718139, at \*4 (N.D. Cal. Apr. 29, 2016). Defendants’ arguments as to the purportedly “substantial”  
 5 ground for difference of opinion as to whether patent prosecution documents are “news media” or  
 6 “Federal reports” fare no better, which the Court’s clear rejection of the various nonbinding and  
 7 inapposite cases cited by Defendants demonstrates. (Dkt. 135 at 33-43.)

8 Defendants have also failed to show that an interlocutory appeal would be likely to materially  
 9 advance the ultimate termination of this litigation. This action has been pending for nearly three years,  
 10 and now that it is past the pleadings stage, this action can be ready for trial within the next 18 months.  
 11 An interlocutory appeal, which would certainly take at least one year and could very well take two  
 12 years or longer, would unnecessarily delay the case beyond the expected trial date absent such an  
 13 appeal. An interlocutory appeal would also not result in the ultimate termination of the case because  
 14 the Court’s public disclosure bar rulings are correct and in all likelihood will be affirmed. But even in  
 15 the unlikely event of a reversal, Relator is an original source under the statute, and the parties would  
 16 find themselves two years later litigating that issue (also possibly to an appeal), plus any additional  
 17 issues that Defendants may later decide to interject. This is why the rules contemplate a single appeal  
 18 after final judgment, instead of the piecemeal cycles of litigation and appeal that Defendants urge. The  
 19 Court should therefore deny Defendants’ request for certification and set a schedule that allows the  
 20 case to move forward expeditiously. *See* Fed. R. Civ. P. 1.

21 The Court should also deny Defendants’ fallback request for a stay pending the Ninth Circuit’s  
 22 decisions in *Valeant* and *United States ex rel. Integra Med Analytics LLC v. Providence Health & Servs.*,  
 23 2019 WL 3282619 (C.D. Cal. July 16, 2019). Defendants concede that, although *Valeant* and *Integra*  
 24 also deal with aspects of the public disclosure bar, it is quite possible the Ninth Circuit’s resolution of  
 25 those cases will have no bearing on this Court’s public disclosure rulings. (Mot. at 9.) And it is highly  
 26 unlikely that, even if the *Valeant* and *Integra* decisions do touch on public disclosure issues addressed  
 27 by this Court, they would require the Court to revisit its Order and revise its rulings, particularly since

neither of those cases deal with the specific questions that Defendants seek to certify here, *i.e.*, whether “information reported by the PTO on its public Patent Application Information Retrieval website (‘PAIR’) is a ‘Federal report,’” or whether “information published on the public version of PAIR qualifies as ‘news media.’” (Mot. at 1.) And neither deal with the original source issue, which would then have to be decided, even assuming for the sake of argument that *Valeant* and *Integra* lead to directly applicable, adverse decisions. Defendants’ request for a stay pending the *Valeant* and *Integra* decisions should therefore be denied.

## II. BACKGROUND

Relator filed his initial Complaint on May 22, 2018 (Dkt. 1), and a First Amended Complaint (“FAC”) on January 22, 2019 (Dkt. 12). The Allergan Defendants filed a motion to dismiss the FAC on June 14, 2019 (Dkt. 63), and the Adamas Defendants filed a motion to dismiss on June 21, 2019 (Dkt. 68). On December 19, 2019, the Court heard oral argument on the motions to dismiss (*see* Dkt. 111), and on December 11, 2020, the Court issued a 76-page order denying the motions (Dkt. 135) (the “Order”). The Court concluded that the “disclosures in the patent prosecution history” were “not made through one of the channels specified in the current version of the public disclosure bar, which therefore does not bar Relator’s claims.” (Dkt. 135 at 46.) Because the Court concluded that the public disclosure bar had not been triggered, it did not reach the question of whether Relator is an original source under the statute. (*Id.* at 46 n.17.)

With respect to the question of whether the disclosure of the patent prosecution documents at issue was made through one of the three channels specified in the FCA, the Court thoroughly addressed each of Defendants’ arguments in turn.

First, as to whether the documents constitute Federal reports, the court observed “it is undisputed that patent prosecution is an *ex parte* administrative proceeding in which the Government is not a party.” (Dkt. 135 at 33.) Following the Supreme Court’s instruction from *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401 (2011), that the FCA must be read as an “integrated whole,” and applying well-established rules of statutory construction, the Court concluded that “the limitation Congress added to romanette (i) of the public disclosure bar in 2010 would be all but eviscerated as to



any federal administrative matter if the Court were to adopt the broad reading of ‘Federal report’ urged by Defendants, as doing so would result in an interpretation under which *any* federal proceeding with a public docket – regardless of whether or not the Government was a party – would become a permissible channel that could trigger the public disclosure bar.” (Dkt. 135 at 33-34 (emphasis in original).) The Court rejected Defendants’ “reliance on a handful of cases in which courts purportedly found that comparable materials were ‘reports’ for the purposes of the FCA,” explaining that those cases, most of which applied the pre-2010 version of the public disclosure bar and were thus inapposite, were also readily distinguishable because the documents at issue in those cases differed markedly from the patent prosecution documents at issue here. (*Id.* at 36-40.)

Next, the Court addressed Defendants’ contention that “patent prosecution histories published on PAIR are not only ‘reports’ under the FCA but also ‘news media’” simply because they are available on the Internet. (Dkt. 135 at 41.) The Court declined to rely on the handful of mostly unpublished district court cases cited by Defendants, none of which attempted to ascertain the ordinary meaning of the term “news media” or to analyze the text of the statute. Instead, the Court agreed with the approach set forth by Judge Gutierrez in *United States ex rel. Integra Med Analytics LLC v. Providence Health & Servs.*, 2019 WL 3282619 (C.D. Cal. July 16, 2019) (“*Integra I*”). The Court concluded that “[c]ertainly, docket sheets such as PACER and PAIR do not fall within the meaning of the term ‘news media’ as it is ordinarily used.” (Dkt. 135 at 43.) The Court further determined that, “as Judge Gutierrez recognized in his discussion of PACER, interpreting ‘news media’ to include a public docket such as PAIR would be contrary to Congress’s intent when it amended the FCA’s public disclosure bar in 2010, as it would nullify the limitation Congress added to romanette (i) for the same reasons set forth above with respect to the term ‘Federal report.’” (*Ibid.*) The Court thus concluded that the documents at issue were not disclosed by the “news media.” (*Ibid.*)

The Court then turned to a contention that “neither set of Defendants argued in the original motion papers,” namely, that “the alleged fraud was disclosed in a ‘Federal . . . hearing’” within the meaning of the statute. (Dkt. 135 at 43-44.) The Court rejected that argument and “respectfully disagree[d] with the court’s reasoning in *Valeant*.” (*Id.* at 44.) The Court observed that the *Valeant*



1 court's interpretation of "Federal . . . hearing" is in "direct conflict with what Congress intended when  
 2 it amended the public disclosure bar in 2010." (*Ibid.*) The Court further noted that "the *Valeant* court's  
 3 interpretation of the term 'Federal . . . hearing' . . . results in . . . virtually total nullification of the  
 4 language that Congress added to romanette (i) of the public disclosure bar in 2010 as applied to any  
 5 federal proceeding." (*Id.* at 44-45.) The Court therefore concluded that the patent prosecution history  
 6 at issue in this case is not a Federal hearing under the current version of the statute. (*Id.* at 46.)

7 Having concluded that the public disclosure bar does not require dismissal of Relator's claims,  
 8 the Court turned to an analysis of whether Relator had stated a valid claim against Defendants under  
 9 the FCA. The Court concluded that Relator had adequately alleged false claims under theories of  
 10 promissory fraud as well as implied certification (Dkt. 135 at 63-71); that Relator adequately alleged  
 11 facts showing materiality (*id.* at 71-73); and that Relator adequately alleged scienter (*id.* at 73-74).

12 The Court did not indicate anywhere in its 76-page Order that it had any uncertainty regarding  
 13 its public disclosure rulings or other conclusions. Nor did the Court suggest that it believed the  
 14 extraordinary step of an interlocutory appeal was warranted to address any of the questions presented.  
 15 Accordingly, the Court denied Defendants' motions in their entirety; set a Case Management  
 16 Conference for January 15, 2021; and directed the parties to propose a schedule for the case.  
 17 (Dkt. 135.) The Court subsequently rescheduled the Case Management Conference for February 5,  
 18 2021, to coincide with the hearing on the instant motion. (*See* Dkt. 141.)

### 19 **III. ARGUMENT**

#### 20 **A. The Court Should Decline to Certify the Order for Interlocutory Appeal**

##### 21 **1. Interlocutory Appeal Is Reserved for Rare Circumstances**

22 In general, an appellate court should not review a district court ruling until after entry of final  
 23 judgment. *See* 28 U.S.C. § 1291. Because interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is "a  
 24 departure from the normal rule that only final judgments are appealable," the statute "therefore must  
 25 be construed narrowly." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002).  
 26 Interlocutory appeal is reserved for "rare circumstances," *ibid.*, and is to be "applied sparingly and  
 27 only in exceptional cases." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1025 (9th Cir. 1981), *cause*

1 *dismissed sub nom. Arizona v. U.S. Dist. Court for the Dist. of Arizona*, 459 U.S. 961 (1982), and *aff'd*  
 2 *sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983). Use of immediate interlocutory  
 3 appeals is “not intended merely to provide review of difficult rulings in hard cases.” *United States*  
 4 *Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966).

5 Section 1292(b) gives the trial court discretion to certify a non-final decision for interlocutory  
 6 review, but only if all of the following statutory elements are met: (1) “the order involves a controlling  
 7 question of law,” (2) “as to which there is substantial ground for difference of opinion,” and (3) “an  
 8 immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28  
 9 U.S.C. § 1292(b). The party pursuing the interlocutory appeal “bears the burden of establishing  
 10 § 1292(b)’s narrowly construed elements.” *United States ex rel. Mei Ling v. City of Los Angeles*, 2019  
 11 WL 6971061, at \*2 (C.D. Cal. Oct. 2, 2019) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475  
 12 (1978)).

13 The district court’s decision to certify an order for interlocutory appeal is entirely  
 14 discretionary; thus, “[e]ven when all three statutory criteria are satisfied, district court judges have  
 15 ‘unfettered discretion’ to deny certification.” *Heaton v. Soc. Fin., Inc.*, 2016 WL 232433, at \*2 (N.D.  
 16 Cal. Jan. 20, 2016) (quoting *Brizzee v. Fred Meyer Stores, Inc.*, 2008 WL 426510, at \*3 (D. Or. Feb.  
 17 13, 2008)). The district court’s certification decision is unreviewable. *See Exec. Software North Am.,*  
 18 *Inc. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 24 F.3d 1545, 1550 (9th Cir. 2008), *overruled on other*  
 19 *grounds by Cal. Dept. of Water Resources v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008).  
 20 Moreover, “[e]ven where the district court makes such a certification, the court of appeals nevertheless  
 21 has discretion to reject the interlocutory appeal,” which it does “quite frequently.” *James*, 283 F.3d at  
 22 1068 n.6 (citation omitted).

## 23 **2. The Public Disclosure Issues are not Controlling Questions of Law**

24 It is not at all clear the first prong of the Section 1292(b) inquiry is satisfied. While the public  
 25 disclosure questions identified by Defendants are questions of law, they are not dispositive. A  
 26 resolution in Defendants’ favor might not advance the litigation at all because Relator could still be  
 27 deemed an original source under the statute (a question the Court did not reach). In that circumstance,  
 28

we would find ourselves exactly where we are now, after more than a year of additional delay. Thus, these questions should not be deemed “controlling,” and Defendants’ request for interlocutory appeal can be denied on this basis alone.

### 3. Defendants Have Failed to Establish Substantial Ground for Difference of Opinion as to the Public Disclosure Bar

“To determine if a ‘substantial ground for difference of opinion’ exists under § 1292(b), courts must examine to what extent the controlling law is unclear.” *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Courts may find that substantial grounds for difference of opinion exist where “the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.” *Ibid.* (citation omitted). Courts may find substantial ground for difference of opinion as to novel issues “where reasonable jurists might disagree on an issue’s resolution, not merely where they have already disagreed.” *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). However, “it would not warrant a § 1292(b) appeal simply because another district court reached a different decision in a broadly similar case.” *Tsyn*, 2016 WL 1718139, at \*4 (citing, *inter alia*, *Spears v. Wash. Mut. Bk. FA*, 2010 WL 54755, at \*3 (N.D. Cal. Jan. 8, 2010) (“[T]hat one district court came to a different conclusion on the same issue is insufficient to establish a substantial ground for difference of opinion.”)). Just because “reasonable minds may differ” or “courts are reaching different conclusions” as to the resolution of a particular issue, it does not necessarily follow that the requirement of a “substantial” basis for a difference of opinion is satisfied. *DeLuca v. Farmers Ins. Exch.*, 2019 WL 4260437, at \*7 (N.D. Cal. Sept. 9, 2019); *see also Couch*, 611 F.3d at 633 (“just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal”).

Defendants have failed to establish substantial grounds for difference of opinion regarding any of the three public disclosure questions they identify.

First, with respect to the Court’s determination that the patent prosecution documents at issue do not constitute “Federal reports” under the current version of the public disclosure bar, Defendants

claim that the Court “departed from significant prior precedent.” (Mot. at 7.) Defendants do not cite any of this supposedly “significant” precedent in their Motion, with good reason. As the Court explained at length in the Order, Defendants rely “on a handful of cases in which courts purportedly found that comparable materials were ‘reports’ for the purposes of the FCA,” yet “one of the cases cited by Defendants . . . did not address the ‘report’ channel of disclosure at all,” and the remaining cases, “most of which apply the pre-2010 version of the public disclosure bar,” concern other types of documents that are readily distinguishable from the patent prosecution materials at issue here. (Dkt. 135 at 36-40.) Undeterred, Defendants cite back to their motion to dismiss briefing to contend that “*Schindler* and its progeny provide ample authority” for their position. (Mot. at 8 (*citing* Dkt. 94 at 5-7.) In doing so, Defendants completely ignore this Court’s thorough analysis and application of the principles articulated in *Schindler* to the precise question of the meaning of “Federal report” as used in the current version of the public disclosure bar. (Dkt. 135 at 33-36.) In short, Defendants have failed to identify substantial grounds for difference of opinion as to whether documents publicly available on PAIR constitute “Federal reports” under the public disclosure bar, and they merely regurgitate the same arguments the Court has already rejected.

Second, with respect to the Court’s conclusion that the patent prosecution documents do not constitute “news media” under the public disclosure bar, Defendants contend that the Court departed from the “‘general consensus’ of the federal courts as to the broad meaning of the term ‘news media.’” (Mot. at 7, *citing United States ex rel. Integra Med. Analytics LLC v. Providence Health & Servs.*, 2019 WL 6973547, at \*4 (C.D. Cal. Oct. 8, 2019) (“*Integra II*”).) While it is correct to say, as this Court noted, that “numerous cases” have in the past interpreted the term “news media” broadly, it is wrong to contend that anything resembling a “general consensus” exists for Defendants’ expansive definition of news media as encompassing everything available on the Internet. Notably, in *Integra*, Judge Gutierrez appears to have been the first jurist to “attempt[] to define the ordinary meaning of the term ‘news media’ or to otherwise ground their interpretation in the statutory text,” *Integra I*, 2019 WL 3282619, at \*13, and Defendants have pointed to no decision post-*Integra* that has rejected Judge Gutierrez’s analysis. And, as Judge Gutierrez noted, most of the prior cases to address the issue “did

not undertake their own independent analysis of the meaning and scope of the news media provision and instead simply cited to previous decisions of other courts (that themselves often contained sparse analysis) with little additional explanation.” *Ibid.* In other words, there has been no difference of opinion, much less a substantial difference of opinion, when it comes to interpreting “news media” based on its ordinary meaning and consistent with the overall text of the statute. *Cf. Tumampos v. Cathay Pac. Airways Ltd.*, 2017 WL 10443170, at \*2 (N.D. Cal. June 30, 2017) (concluding that the court’s “plain language analysis” of a statutory issue had “not been addressed squarely in any of the decisions cited by the parties,” and that “[t]he Court’s analysis was new, and disputed by Defendant, but this is not the type of extraordinary issue requiring interlocutory review”).

Furthermore, Defendants have failed to demonstrate that a substantial basis for a difference of opinion exists as to either of the Court’s core conclusions on the particular question presented, *i.e.*, whether the patent prosecution documents fall within the definition of “news media.” Specifically, the Court concluded that “[c]ertainly, docket sheets such as PACER and PAIR do not fall within the meaning of the term ‘news media’ as it is ordinarily used,” and that “interpreting ‘news media’ to include a public docket such as PAIR would be contrary to Congress’s intent when it amended the FCA’s public disclosure bar in 2010, as it would nullify the limitation Congress added to romanette (i).” (Dkt. 135 at 43.) Defendants have not pointed to a single case that disagrees with either of these fundamental conclusions, and Defendants cannot credibly argue that substantial ground exists that warrants the exceptional step of certifying them for interlocutory review. Thus, although *Integra* has been certified for interlocutory appeal, and while there may be room for disagreement as to the precise scope and contours of the definition of “news media,” none of the authorities cited by Defendants demonstrate a substantial basis for a difference of opinion as to the specific question for which Defendants seek certification: “Whether information published on the public version of PAIR qualifies as ‘news media’ as that term is used in Section 3730(e)(4)(A)(iii).” (Mot. at 1.) The Court’s statutory construction is manifestly correct, and Defendants do not provide a persuasive reason to doubt it.

Third, with respect to “Federal hearing,” Defendants rely on an argument they never made in their motion to dismiss papers, *i.e.*, that the patent prosecution history published on PAIR constitutes a

1 Federal hearing under romanette (ii) of the statute. Defendants argue that this Court’s disagreement  
 2 with *Valeant* demonstrates that “reasonable jurists . . . have already disagreed,” and therefore  
 3 substantial ground for difference of opinion exists. (Mot. at 7.) Defendants are correct that this Court’s  
 4 careful analysis of the statutory text and structure led it to disagree with the court’s reasoning in  
 5 *Valeant*. (Dkt. 135 at 43-45.) Yet, Defendants point to no case other than *Valeant* that has taken such  
 6 an expansive view of the phrase “Federal hearing,” and courts in this district have held that “it would  
 7 not warrant a § 1292(b) appeal simply because another district court reached a different decision in a  
 8 broadly similar case.” *Tsyn*, 2016 WL 1718139, at \*4; *Spears*, 2010 WL 54755, at \*3; *DeLuca*, 2019  
 9 WL 4260437, at \*7.

10 Accordingly, Defendants have failed to establish that substantial grounds for difference of  
 11 opinion exist that warrant the extraordinary measure of immediate interlocutory review of this Court’s  
 12 public disclosure rulings.

13 **4. Defendants Have Failed to Establish That Interlocutory Review of the Order**  
 14 **Will Materially Advance the Ultimate Termination of this Litigation**

15 There are “no set criteria a court is required to consider when evaluating whether an  
 16 interlocutory appeal will materially advance the litigation. Courts apply pragmatic considerations to  
 17 determine whether certifying non-final orders will materially advance the ultimate termination of the  
 18 litigation.” *Beeman v. Anthem Prescription Mgmt., Inc.*, 2007 WL 8433884, at \*2 (C.D. Cal. Aug. 2,  
 19 2007). Courts often find that the “likelihood of delay” weighs against certifying an interlocutory  
 20 appeal. *United States ex rel. Mei Ling v. City of Los Angeles*, 2019 WL 6971061, at \*5 (C.D. Cal. Oct.  
 21 2, 2019). “[E]ven when a trial date is not set, an appeal can still unnecessarily delay the termination of  
 22 the litigation.” *Ibid.* (citing *Andrews v. Plains All Am. Pipeline, L.P.*, 2017 WL 9831401, at \*5 (C.D.  
 23 Cal. Nov. 7, 2017)). Courts have counseled that an interlocutory appeal must be “likely to materially  
 24 speed the termination of the litigation.” *Allen v. ConAgra Foods, Inc.*, 2019 WL 1466889, at \*3 (N.D.  
 25 Cal. Feb. 6, 2019) (quoting *Ambrosio v. Cogent Commc’ns, Inc.*, 2016 WL 777775, at \*3 (N.D. Cal.  
 26 Feb. 29, 2016)).

Relator filed his initial Complaint in this case in May 2018, and the action has been pending now for close to three years. An interlocutory appeal to the Ninth Circuit, which could take “upwards of two years to be resolved,” would only serve to “further protract” this case. *Mei Ling*, 2019 WL 6971061, at \*5. Consistent with its duty to secure the “just, speedy, and inexpensive determination” of the action, Fed. R. Civ. P. 1, the Court is poised to enter a scheduling order and set a trial date at the upcoming case management conference. To that end, Relator has proposed a case schedule with an anticipated trial date in July 2022, approximately 18 months from the date of the case management conference. (See Dkt. 144 at 12-15.) Under the proposed schedule, it is likely that trial would take place prior to the Ninth Circuit’s resolution of an interlocutory appeal. The anticipated delay resulting from an interlocutory appeal thus counsels against certification here. See, e.g., *Shurance v. Planning Control Int’l, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988) (denying an interlocutory appeal that “probably could not be completed” before the scheduled trial date); *Andrews v. Plains All Am. Pipeline, L.P.*, 2017 WL 9831401, at \*5 (C.D. Cal. Nov. 7, 2017) (denying certification because “if an interlocutory appeal were to move forward, then trial in this action would likely be delayed”).

Defendants claim that “[a]bsent a stay, the parties will soon begin a very burdensome discovery process.” (Mot. at 8.) Discovery in this case will be no more burdensome than in other similar cases. Defendants are also familiar with discovery in these types of cases in general and are well-equipped to respond to the specific discovery issues they raise. The patent issues in this case have already been subject to discovery in connection with prior proceedings, and the first phase of the discovery here will simply require Defendants to produce what has already been produced in past litigation. Moreover, many of the documents relating to Defendants’ scienter and scheme to protect the chemical compound (memantine HCl) from generic competition—such as internal market erosion analyses—would likely have already been produced in *In re Namenda IR Antitrust Litig.*, 1:15-cv-07488-CM (S.D.N.Y.).<sup>1</sup> Finally, the district court in *In re: Restasis Antitrust Litigation*, Case No.

<sup>1</sup> Although that case involved different anticompetitive misconduct by Allergan through “product hopping” from the “immediate release” version of Namenda to the extended-release version (Namenda XR) relevant here, internal company documents relating to Allergan’s plans to protect the molecule from generic competitors that were produced in the prior antitrust action would also be relevant here.



1 1:18-md-02819 (E.D.N.Y.), which involves allegations that Allergan fraudulently obtained patents to  
 2 protect their dry eye drug monopoly, required Allergan to engage in discovery at least as burdensome,  
 3 and likely far more so, than the anticipated discovery in this case, without interlocutory appeals or  
 4 unnecessary stays. Allergan is thus already quite familiar with identifying and producing the same  
 5 types of documents that will also be required in this case.

6 Defendants also assert there may be significant discovery required of government agencies,  
 7 such as their purchases or reimbursements for Namenda XR and Namzaric. But drug utilization,  
 8 purchase, and reimbursement data are already maintained by the relevant paying agencies. Exporting  
 9 such data for disclosure will not be unduly burdensome, especially since the Government is the  
 10 primary beneficiary that stands to recover billions of dollars in healthcare funds wasted as a result of  
 11 Defendants' unlawful misconduct. Such minor burden on the Government (especially compared with  
 12 the corresponding benefit) cannot justify delaying this case unnecessarily for years, while foreclosing  
 13 any possibility of settlement in the meantime. Indeed, the Government's purchase data and payment  
 14 decisions are relevant in virtually every *qui tam* action, and if Defendants' argument were accepted,  
 15 that potentially could cause many *qui tams* to be delayed through interlocutory appeals and stays.

16 In sum, an interlocutory appeal in this action is likely to significantly delay a case that has been  
 17 pending for nearly three years, and which in all likelihood could proceed to trial sooner than an  
 18 interlocutory appeal would be completed. In any event, the Court's Order is well-reasoned, correct,  
 19 and therefore likely to be upheld on appeal. Certification therefore is unlikely to materially advance  
 20 the termination of this case, and Defendants' motion should be denied.

21 **B. The Court Should Decline to Stay This Action Pending an Interlocutory Appeal**

22 Whether to stay this case pending an interlocutory appeal is a matter committed to this Court's  
 23 sound discretion. "A stay is not a matter of right, even if irreparable injury might otherwise result."  
 24 *Nken v. Holder*, 556 U.S. 418, 433–34 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S.  
 25 658, 672 (1926)). "It is instead 'an exercise of judicial discretion,' and '[t]he propriety of its issue is  
 26 dependent upon the circumstances of the particular case.'" *Nken*, 556 U.S. at 433-34 (quoting  
 27 *Virginian R. Co.*, 272 U.S. at 672-673). The Supreme Court has articulated a four-factor test for

whether a stay should issue in any particular case: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken*, 556 U.S. at 434. These factors are measured under a “‘general balancing’ or ‘sliding scale’ approach, under which ‘a stronger showing of one element may offset a weaker showing of another.’” *Stiner v. Brookdale Senior Living, Inc.*, 383 F. Supp. 3d 949, 953 (N.D. Cal. 2019) (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011)).

As to the showing of likelihood of success on the merits, “if a movant is unable to show a ‘strong likelihood of success,’ then the movant must at least demonstrate that the appeal presents a ‘substantial case on the merits,’ or that there are ‘serious legal questions’ raised.” *Stiner*, 383 F. Supp. at 953. Because courts in the Ninth Circuit take a “sliding scale” approach, a movant who can only meet this “lower threshold” under the first factor “must then demonstrate that the balance of hardships under the second and third factor tips *sharply* in the movant’s favor.” *Ibid.* (emphasis added); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2015 WL 4397175, at \*3 (C.D. Cal. June 8, 2015). The moving party “bears the burden of showing that the circumstances justify” a stay. *Stiner*, 383 F. Supp. 3d at 953.

Here, Defendants do not even attempt to argue they have a strong likelihood of success on the merits. At most, Defendants contend that “there are serious questions on the merits here” which make a stay appropriate. (Mot. at 11.) For the same reasons that Defendants have failed to establish there is substantial ground for difference of opinion on the specific public disclosure questions at issue, Defendants have not shown that there is a “serious question” on the merits warranting a stay. *See* Section III(A)(3), *supra*, at 7-10. This factor weighs against the issuance of a stay.

As to the second and third factors, under the sliding scale approach, Defendants are required not just to demonstrate “irreparable injury,” but that the balance of harms tips “sharply” in their favor. They have failed to do so. Defendants speculate that discovery will be particularly expansive and burdensome in this case, but there is no reason to believe discovery here will be any more burdensome

to Defendants than discovery in other complex litigation of its type, with which Defendants are familiar and to which they are well-equipped to respond. On the other hand, a significant delay will harm not just Relator, but the Federal and state governments on whose behalf this action is brought. As the State of California recognized in its statement of interest (Dkt. 133), this action has major importance for government health programs, not only because the government stands to recover billions of dollars in fraudulent overcharges, but also because this action may set an important precedent that would discourage similar overcharges resulting from the misuse of fraudulently-obtained patents. Consequently, the significant delay Defendants seek could deprive the government of a significant and much-needed financial recovery and delay the development of law that could help curb drug-pricing abuse and expand affordable access to healthcare.

For the same reason, the public interest factor weighs against a stay. The public has a significant interest in prompt resolution of cases, like this one, that “may help lower the price of medicine and the cost of health insurance.” (Dkt. 133 at 3.) A lengthy stay of this action pending an interlocutory appeal, which would likely last at least a year, and possibly even two years or more, would not just delay trial, but would also be likely to significantly delay the chances of a settlement, which is the means by which most cases are resolved. For example, Allergan settled *In re Namenda IR Antitrust Litig.* for \$750 million before trial, see 1:15-cv-07488 (S.D.N.Y.), at Dkt. 947—avoiding the need for any appeals whatsoever. Had there been an interlocutory appeal or a stay in the *Namenda IR Antitrust Litig.* when the defendants initially lost their motions to dismiss, that case would likely not have settled and would probably still be in litigation today. Thus, in the event this Court certifies its Order for interlocutory appeal, it should exercise its discretion to decline to stay the case.

**C. The Court Should Decline to Stay This Action Pending the Resolution of the Ninth Circuit Appeals in the *Valeant* and *Integra* Cases**

The pending appeals in *Valeant* and *Integra* do not warrant a stay of this case. In determining whether to exercise its discretion to “stay proceedings pending disposition of another case that could affect the outcome,” the Court “must balance the length of the delay against the justifications for the stay.” *Asis Internet Servs. v. Active Response Grp.*, 2008 WL 4279695, at \*4–5 (N.D. Cal. Sept. 16, 2008) (citing *Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000)). Specifically, the Court should weigh

“(1) the possible damage which may result from the granting of a stay, (2) the hardship or inequity which a party may suffer in being required to go forward, and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.” *Phan v. Transamerica Premier Life Ins. Co.*, 2020 WL 5576358, at \*2 (N.D. Cal. Sept. 17, 2020) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). The moving party bears the burden of establishing a need for a stay. *Ibid.* (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997)). A stay of indefinite duration requires the moving party to demonstrate a “pressing need.” *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936).

Defendants request an indefinite stay of this action pending the Ninth Circuit’s resolution of the *Valeant* and *Integra* appeals. They do not articulate any “pressing need” for this stay; their only argument is that “the Ninth Circuit’s analysis in both cases may be of valuable assistance to this Court in considering Defendants’ public-disclosure-bar defenses,” and that “[b]oth cases will clarify the scope and meaning of the public disclosure bar after the 2010 amendments and could alter this Court’s analysis of the issues presented by Defendants’ motions to dismiss.” (Mot. at 12-13.) Yet Defendants have acknowledged there is a very good chance the Ninth Circuit’s decisions in *Valeant* and *Integra* will not affect this Court’s analysis of the specific public disclosure bar questions at issue here. (See Mot. at 9 (“it is possible the Ninth Circuit will decide *Valeant* without addressing one of the core controlling questions of law presented here,” and that “the Ninth Circuit’s *Integra* decision will announce a rule for private websites, but not Government ones”<sup>2</sup>).) Thus, while the Ninth Circuit’s forthcoming decisions undoubtedly will address the scope of the public disclosure bar in general, it is highly speculative whether either of those decisions will require the Court to reverse any of its key conclusions, such as whether patent prosecution documents fall within one of the enumerated channels of the statute. To the contrary, the likely outcome is that the Ninth Circuit’s resolution of *Valeant* and *Integra*—even if they provide additional clarity around the public disclosure bar—will not change the

<sup>2</sup> *Integra* is also unlikely to lead to a directly applicable holding, even if the Ninth Circuit reverses, because the issue relating to nullification of Congress’s 2010 amendments to 31 U.S.C. § 3730(e)(4)(A)(i) is not squarely presented in *Integra* as it is here.

1 outcome in this case. A stay is thus unlikely to “simplify[]” the specific “questions of law” this Court  
2 has already thoroughly addressed. *Phan*, 2020 WL 5576358, at \*2 (*quoting CMAX*, 300 F.2d at 268).

3 Moreover, given Defendants’ view that “the Ninth Circuit will weigh in on both cases within a  
4 reasonable time period” (Mot. at 13), any burden to Defendants of proceeding with discovery between  
5 now and then will be relatively low. In the unlikely event that *Valeant* or *Integra* requires this Court to  
6 revisit its public disclosure rulings, the Court could do so in short order. The hardship or inequity  
7 Defendants might face in being required to go forward at this juncture is therefore minimal. By  
8 contrast, Relator and the federal and state governments have an interest in the prompt recovery of the  
9 overcharges incurred by them, and a stay of even a few months would delay any such recovery, with  
10 little prospect that such a delay would have made make any difference at all. The orderly course of  
11 justice weighs in favor of continuing to move this case forward, rather than staying it indefinitely.

12 The most efficient course, therefore, is to proceed expeditiously with this matter, consistent  
13 with the principle underlying Rule 1 of the Federal Rules of Civil Procedure that provides for the “just,  
14 speedy, and inexpensive” adjudication of Relator’s claims.

#### 15 **IV. CONCLUSION**

16 For the foregoing reasons, the Court should deny Defendants’ motion in its entirety.  
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